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No. 80-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERCK & CO., INC.,
Petitioner,

v.

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES

and

UNITED STATES OF AMERICA

ON CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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As the conditional petitions in this case and *SmithKline v. Staats* (No. 80-434) explain, the *Staats v. Bristol* case (No. 80-264) is not the appropriate vehicle for review of the issues presented by the five related cases that have spawned an inter-circuit conflict. First, of the five companion cases, *Bristol* alone presents a truncated version of the basic statutory interpretation question. As a result, a decision

by this Court in *Bristol* would not even resolve the controversy presented by these companion cases and would not avoid the need for further litigation of these cases in the circuit courts or the prospect of a second plenary review of the same statutory framework in this Court. *Merck* Pet. at 10-13. Second, deficiencies in the record in *Bristol* counsel against its selection as the sole vehicle for review. *Merck* Pet. at 15-16. Although the government opposes both of the alternatives advanced by Merck and SmithKline in their petitions—either deferring review by denying all petitions or consolidating all three cases for review now — the government fails to provide any sound basis for rejecting these courses.

1. The government asks this Court to grant review now in *Bristol* but fails to demonstrate that an immediate resolution of the conflict created by that case is necessary. Although litigation involving these five companion cases has been pending in the federal courts since 1974, the government does not cite even a single instance in which an access-to-records has been resisted by any other government contractor because of uncertainty regarding the scope of the Comptroller General's statutory authority created by these cases.

The record in this case explains why there has been no disruption of the GAO's activities by this litigation—the demands challenged in these companion cases represent a unique and abberational use of the access-to-records statutes. As the government acknowledged in discovery taken in this case, *every* contract and subcontract examined by the General Accounting Office pursuant to its access-to-records

authority in fiscal years 1974-1975 — contracts totalling $814,900,000 — was negotiated on the basis of cost estimates supported by cost and pricing data submitted by the contractors. (C.A. App. 57-58, 147).[1] The decision in *Bristol* does not jeopardize the continued examination of such records in connection with audits conducted under the access-to-records statutes.

Immediate review in *Bristol* will not even advance the GAO's pursuit of the records sought in these five related cases since the GAO has deferred any examination of records until all of these cases are resolved. As the government has acknowledged, a decision in *Bristol* will not obviate the need for further litigation in *Merck* and *SmithKline*, since the contractors raise broader issues in these cases. *See* Brief in Opp. in *SmithKline* at 18.[2]

In short, no substantial purpose would be served by granting immediate review in *Bristol*. The brief delay required to permit decisions to be rendered in *Merck* and *SmithKline* would benefit this Court by providing the views of two other circuits and by enabling the Court to resolve all of the issues raised by these companion cases at one time.

2. The government's brief in opposition opposes the petitions filed by Merck and SmithKline because there is as yet no conflict among the circuits on the two issues presented in these petitions. Brief in Opp. in *SmithKline* at 6-7. This response, however, ignores

[1] References in the form "C.A. App." are to the joint appendix filed by the parties in the court of appeals.

[2] The government's brief in opposition in this case relies on the brief in opposition filed in *SmithKline*.

the conditional nature of these petitions. The critical factors in evaluating these petitions are whether joint consideration of these cases would assist the Court if it chooses to grant review in *Bristol* and whether joint review would constitute an economical and efficient utilization of the Court's resources. Both of these factors weigh heavily in favor of granting the conditional petitions if the Court accepts review in *Bristol*.

As noted in the petition, the record in the *Merck* case is considerably more comprehensive than the record in *Bristol*. *Merck* Pet. at 12, 15. Among the important additional matters contained in the record in this case are GAO testimony and GAO memoranda and rulings adduced during discovery. This evidence, not included in the *Bristol* record, shows the unique and unprecedented nature of the access demands challenged in these companion cases and reveals the virtually limitless range of records sought by the Comptroller General in these cases. This evidence contradicts the argument that the government is making in *Bristol* that it has consistently taken the sweeping position asserted in this litigation.

In addition to assisting the Court address the issues presented in *Bristol*, joint consideration of these cases would promote judicial economy and efficiency by alleviating the need for further litigation of related issues in the courts of appeals and in this Court. *Merck* Pet. at 10-13. This litigation will continue no matter how *Bristol* is decided if *Bristol* is reviewed alone. There is a substantial possibility that a decision by the courts of appeals in either *Merck* or *SmithKline* would generate another circuit conflict on the issues not framed in *Bristol*. As noted in our

petition, the broader issues presented by these two cases have sharply divided the Seventh Circuit. That court's decision in favor of the government rests on a basis that has been criticized by scholars and has not even been embraced by the government. *Merck* Pet. at 9n.3, 11, 11-12 n.4, 13 & n.6.

Resolution of the broader issues presented in this case and in *SmithKline* would not unduly expand the questions that would have to be examined by the Court in addressing the narrow issue raised in *Bristol*. As the government has acknowledged, the issues presented in each of these cases turn primarily on the purpose and scope of the Comptroller General's access authority as revealed in the legislative history of the access-to-records statutes. *See Bristol* Pet. at 10-11; Brief in Opp. in *SmithKline* at 8-9.[3]

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[3] The legislative history of the access-to-records statutes belies the government's claim that Congress authorized the Comptroller General to examine a contractor's records in order to assess the adequacy of government procurement techniques. *See Merck* Pet. at 14 & nn.7-8. As the author of the access-to-records legislation explained during the House debates, the "sole purpose of the bill is to enable the Comptroller General to make effective audits" of government contracts in order "to provide a deterrent to improprieties and wastefulness." 97 Cong. Rec. 12611, 13198 (1951).

As one commentator has concluded, it is "difficult to justify the government's contention that the purposes of section 2313(b) included the improvement of procurement procedures" since "the legislative history of § 2313(b) would seem to indicate that the purpose was solely to provide a method to discover fraudulent activities." Note, *Government Contracts: Contractor's Obligation to Allow Examination of Records Under 10 U.S.C. § 2313(b)*, 72 Dick. L. Rev. 687, 691 (1968).

3. There is ample precedent for granting certiorari before judgment where the Court decides to accept review in a closely related case. *See Merck* Pet. at 16-17. In an effort to distinguish the precedents cited by petitioner, the government has ascribed reasons for the grant of review in those cases that nowhere appear in the Court's opinions. Brief in Opp. in *SmithKline* at 19. For example, in *Porter v. Dicken*, 328 U.S. 251, 254 (1946), the Court explained that it was "prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented" in a related case. *See also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963) (companion cases involving the same facts and presenting the same issue). Here, as in those cases, certiorari before judgment is appropriate since it is sought in a companion case arising out of the same factual circumstances and presenting closely related legal questions.

CONCLUSION

If the Court grants the Solicitor General's petition in *Staats v. Bristol Laboratories Division*, No. 80-264, certiorari before judgment should be granted in this case and, under Rule 37.3, the cases should be consolidated for argument or set for argument in tandem.

Respectfully submitted.

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